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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RAHINAH IBRAHIM, an individual,

Plaintiff,

vs.

DEPARTMENT OF HOMELAND
 SECURITY, et al.,

Defendants.

Case No. C 06-0545 WHA

**PLAINTIFF'S RESPONSES TO
 DEFENDANTS' BRIEF AND PROPOSED
 FINDINGS OF FACT AND
 CONCLUSIONS OF LAW REGARDING
 PLAINTIFF'S DAUGHTER
 (REDACTED)**

Trial Date: December 2, 2013
 Complaint Filed: January 27, 2006

1 Plaintiff hereby responds to defendants' brief and proposed findings of fact and
2 conclusions of law regarding plaintiff's daughter, Raihan Mustafa Kamal. Plaintiff requested
3 that the Court reopen the trial record to introduce the proceedings of Friday, December 6, 2013,
4 during which Maureen Dugan of the National Targeting Center ("NTC") testified regarding Ms.
5 Mustafa Kamal's travel difficulties. Defendants did not produce Ms. Dugan's declaration to
6 plaintiff's counsel or the Court until the final minutes of the trial proceedings on December 5,
7 2013. *See* Trial Tr. 716:9-14. Almost immediately after plaintiff's counsel stated that plaintiff
8 would not have any rebuttal following defendants' case, defense counsel suddenly revealed that
9 Ms. Dugan's declaration was available in the courtroom. *See* Trial Tr. 713:20, 716:9-14.
10 Plaintiff therefore did not have the opportunity to introduce any evidence regarding Ms. Dugan
11 during her own case-in-chief or during rebuttal. Had plaintiff's counsel known that Ms. Dugan's
12 declaration and later testimony would reveal information relevant to plaintiff's case, plaintiff's
13 counsel would not have rested and agreed to close the evidence.

14 Ms. Dugan's live testimony and her declaration dated December 4, 2013, establish that
15 REDACTED

16
17 Ms. Dugan's testimony therefore contradicts REDACTED

18
19 . *See, e.g.*, Defendants' Post-Trial Proposed Findings of Fact and
20 Conclusions of Law, ¶ 4 ("Plaintiff's limited placement REDACTED does not interfere with any
21 liberty or property interest"), ¶ 6 ("Plaintiff's inability to travel to the United States stems from
22 her lack of a visa"). This information is relevant to Dr. Ibrahim's claim that her widespread
23 injuries are redressable by removal REDACTED, and should be considered on the merits. *See,*
24 *e.g.*, Plaintiff's Trial Brief, p. 12 ("Placement on the No-Fly List implicates the liberty interest in
25 international travel So does inclusion in the REDACTED, because this makes it
26 practically impossible for Dr. Ibrahim to obtain a visa to the United States or to proceed through
27 customs once on our shores. REDACTED may also result in the inability to board an
28 international flight, because REDACTED

1 REDACTED "); Fed. R. Evid. 401.

2 While the Court's inquiry into Ms. Mustafa Kamal's travel difficulties began as an
 3 inquiry into witness tampering, it does not change the fact that information relevant to Dr.
 4 Ibrahim's claims came to light as a result. Defendants should not be permitted to benefit from
 5 Ms. Dugan's testimony to explain their actions regarding Ms. Mustafa Kamal, but then shield
 6 that same testimony from plaintiff's case. In addition, defendants have not demonstrated any
 7 prejudice by the consideration of evidence related to Ms. Mustafa Kamal, nor can they, because
 8 the relevant information (*e.g.*, her REDACTED status, and defendants' e-mail to Philippine Airlines
 9 entitled "POSSIBLE NO BOARD REQUEST") was provided by defendants and has always
 10 been known to defendants. Defendants also have access to all of the actors who REDACTED
 11 denied her boarding. On the other hand,
 12 plaintiff would be prejudiced by the omission of the information from the Court's inquiry
 13 because Ms. Mustafa Kamal's REDACTED status, REDACTED, and inability to
 14 travel to the United States, are relevant to Dr. Ibrahim's claims. Plaintiff has already been
 15 prejudiced by defendants' late offer of Ms. Dugan's testimony, the limited ability to cross-
 16 examine Ms. Dugan, the inability to question other government witnesses about Ms. Mustafa
 17 Kamal, and the inability to corroborate Ms. Dugan's testimony.

18 Plaintiff has limited information on which to base her responses to defendants' proposed
 19 findings of fact and conclusions of law regarding Ms. Mustafa Kamal. Without prejudice to
 20 plaintiff's position stated above, plaintiff responds as follows:

21 **PLAINTIFF'S RESPONSES TO DEFENDANTS' PROPOSED FINDINGS OF FACT**

22 **The National Targeting Center**

23 1. REDACTED

24
25 REDACTED

26 **Response to No. 1: Agree that this statement is consistent with Dugan's declaration.**

27 2. REDACTED

1 REDACTED

2
3 REDACTED

4 **Response to No. 2: Agree that this statement is consistent with Dugan's testimony**
5 **and declaration.**

6 3. REDACTED

7 REDACTED

8 **Response to No. 3: Agree that this statement is consistent with Dugan's testimony**
9 **and declaration.**

10 4. REDACTED

11 REDACTED

12 **Response to No. 4: Agree that this statement is consistent with Dugan's declaration.**

13 **Events of December 1, 2013**

14 5. On December 1, 2013, Raihan Binti Mustafa Kamal, Plaintiff's daughter, was
15 booked to travel on December 2, 2013 from Kuala Lumpur, Malaysia to Manila, Philippines (on
16 Malaysia Airlines) and from Manila to San Francisco International Airport (on Philippine
Airlines).

17 Dkt. 651 ¶ 1, 7-8, Ex. B.

18 **Response to No. 5: Agree.**

19 6. REDACTED

20
21 REDACTED

22 **Response to No. 6: Agree that this statement is consistent with Dugan's testimony**
23 **and declaration. Disagree to the extent that this statement suggests that there is any**
24 **evidence that** REDACTED

25 ."

26
27 7. REDACTED
28 REDACTED

1 **Response to No. 7: Agree that this statement is consistent with Dugan's testimony.**

2 **Disagree on the basis that this statement omits any reference to time.** REDACTED

3

4

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6 8. REDACTED

7

8 REDACTED

9 **Response to No. 8: Agree that this statement is consistent with Dugan's declaration.**

10 **Disagree on the basis that there is no evidence that** REDACTED

11

12

13 9. REDACTED

14

15

16 REDACTED

17 **Response to No. 9: Agree that this statement is consistent with Dugan's declaration**
18 **and testimony.**

19

20 10. REDACTED

21

22 REDACTED

23 **Response to No. 10: Agree that this statement is consistent with Dugan's declaration**
24 **and testimony.**

25 11. REDACTED

26

27 REDACTED

28 **Response to No. 11: Disagree to the extent this statement is not supported by Dugan**
 testimony at 809:1-2. Disagree to the extent that a more complete version of this e-mail has

1 **been attached to Ms. Mustafa Kamal's declaration (Dkt. 651, Ex. C). Agree that the**
2 **remainder of this statement is consistent with Dugan's declaration and testimony.**

3 12. REDACTED

4
5 REDACTED

6 **Response to No. 12: Agree that this statement is consistent with Dugan's declaration**
7 **and testimony.**

8 13. REDACTED

9
10 REDACTED

11 **Response to No. 13: Disagree to the extent that this statement is not supported by**
12 **Dugan Decl. ¶ 15. Agree that the remainder of this statement is consistent with Dugan's**
13 **declaration.**

14 14. REDACTED

15
16 REDACTED

17 **Response to No. 14: Disagree to the extent that this statement is not supported by**
18 **Dugan's testimony at 809:3-4, but agree that this statement is consistent with Dugan's**
19 **testimony at 809:5-6 (not cited by defendants). Disagree to the extent that this statement is**
20 **susceptible to the interpretation that REDACTED**

21
22
23
24
25
26 15. REDACTED

1 REDACTED

2 **Response to No. 15: Agree that this statement is consistent with Dugan's testimony**
3 **and declaration.**

4 **Events of December 2, 2013**

5 16. REDACTED

6 REDACTED
7 REDACTED

8 **Response to No. 16: Agree that this statement is consistent with Dugan's**
9 **declaration.**

10 17. REDACTED

11 REDACTED
12 REDACTED
13 REDACTED

14 **Response to No. 17: Agree that this statement is consistent with Dugan's testimony.**
15 **Disagree on the basis that this statement is wholly speculative and defendants are not**
16 **qualified to state REDACTED**

17 18. REDACTED

18 REDACTED
19 REDACTED

20 **Response to No. 18: Agree that this statement is consistent with Dugan's testimony**
21 **and declaration.**

22 19. REDACTED

23 REDACTED
24 REDACTED

25 **Response to No. 19: Disagree on the basis that there is no admissible evidence that**
26 **Ms. Mustafa Kamal was REDACTED . See Mustafa Kamal**
27 **Dec., Dkt. 651, ¶ 19. Defendants supplied no documentation supporting their assertion,**
28 **and their testimony is hearsay and violates the best evidence rule.**

20. REDACTED

REDACTED

Response to No. 20: Disagree to the extent that the Dugan Dec. ¶ 19 does not support the statement that the REDACTED

Disagree that Ms. Mustafa Kamal was booked on a December 3, 2013 flight. See Mustafa Kamal Dec., Dkt. 651, ¶ 19.

21. REDACTED

REDACTED

Response to No. 21: Agree that this statement is consistent with Dugan's testimony. Disagree that REDACTED

22. REDACTED

REDACTED

Response to No. 22: Agree that this statement is consistent with Dugan's testimony. Disagree to the extent that this statement is susceptible to the interpretation that Ms. Mustafa Kamal willfully failed to "show up" for any December 3, 2013 flight. Ms. Mustafa Kamal did not book any such flight and therefore could not have failed to show up for it. Mustafa Kamal Dec., Dkt. 651, ¶ 19.

PLAINTIFF'S RESPONSES TO DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

1. Defendants did not act to deprive Ms. Mustafa Kamal of the ability to testify at trial.

Proposed Findings of Fact: 5-22; *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996) ("Federal courts have inherent powers to manage their own proceedings and to control the conduct of those who appear before them[,] and have the "inherent power to punish bad faith conduct which abuses the judicial process," including witness tampering)

Response to No. 1: Disagree on the basis that Department of Homeland Security (DHS) is a defendant in this matter, and is the parent agency of U.S. Customs and Border Protection (CBP) and the CBP's National Targeting Center (NTC). Second Amended Complaint (Dkt. 161); Dugan Dec. ¶¶ 1, 2. CBP Officers at the Regional Carrier Liaison Group (RCLG) in Honolulu, Hawaii requested via REDACTED e-mail that Philippine Airlines follow a "POSSIBLE NO BOARD REQUEST" REDACTED

; Mustafa Kamal Dec. Ex. C. The practical result of CBP's request was that Ms. Mustafa Kamal was denied boarding on her flight from Kuala Lumpur to Manila on December 1, 2013, and ultimately the ability to testify at trial. Mustafa Kamal Dec. ¶¶ 10-19.

2. Defendants' Counsel did not act to deprive Ms. Mustafa Kamal of the ability to testify at trial.

Proposed Findings of Fact: 5-22; *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996)

Response to No. 2: Agree that defendants did not present evidence that defendants' counsel acted to deprive Ms. Mustafa Kamal of the ability to testify at trial.

3. Defendants did not deny Raihan Binti Mustafa Kamal boarding on her Kuala Lumpur to Manila flight on December 1, 2013.

Proposed Findings of Fact: 9-21; 8 U.S.C. § 1103; 8 U.S.C. § 1323

Response to No. 3: Disagree on the basis that Department of Homeland Security (DHS) is a defendant in this matter, and is the parent agency of U.S. Customs and Border Protection (CBP) and the CBP's National Targeting Center (NTC). Second Amended Complaint (Dkt. 161); Dugan Dec. ¶¶ 1, 2. CBP Officers at the Regional Carrier Liaison Group (RCLG) in Honolulu, Hawaii requested via REDACTED e-mail that Philippine Airlines follow a "POSSIBLE NO BOARD REQUEST" REDACTED

Mustafa Kamal Dec. Ex. C. The practical result of CBP's request was that Ms. Mustafa Kamal was denied boarding on her flight from Kuala Lumpur to Manila on December 1, 2013, and ultimately the ability to testify at trial. Mustafa Kamal Dec. ¶¶ 10-19. Disagree on the basis that 8 U.S.C. § 1103 (entitled "Powers and duties of the

1 **Secretary, the Under Secretary, and the Attorney General) and 8 U.S.C. § 1323 (entitled**
 2 **“Unlawful bringing of aliens into United States) do not support the legal conclusion that**
 3 **defendants did not deny Ms. Mustafa Kamal boarding on her flight.**

4 4. CBP’s December 1, 2013 email to Philippine Airlines regarding Ms. Mustafa
 5 Kamal was sent in connection with the agency’s practice of assisting carriers transporting
 6 passengers to the United States to inform the carrier’s decisions with respect to those passengers
 7 who may lack appropriate documentation or be found inadmissible upon arriving at a United
 8 States port of entry.

8 U.S.C. § 1231(e); 8 U.S.C. § 1323.

8 **Response to No. 4: Disagree on the basis that 8 U.S.C. § 1231(e) (entitled “Payment**
 9 **of expenses of removal”) and 8 U.S.C. § 1323 (entitled “Unlawful bringing of aliens into**
 10 **United States) do not describe the legal basis for CBP’s particular “practice of assisting**
 11 **carriers.”**

12 5. Ms. Mustafa Kamal’s assertions regarding her travel difficulties are not relevant
 13 to this litigation because she is not a party to this litigation, this case is not a class action, and the
 14 evidence does not relate to a claim or defense.

Compl., Dkt. 161; Federal Rules of Evidence 401

15 **Response to No. 5: Disagree on the basis that Ms. Mustafa Kamal’s travel**
 16 **difficulties are relevant to Dr. Ibrahim’s due process claim that placement REDACTED**
 17 **infringes on her fundamental rights, including the right to travel internationally. Second**
 18 **Amended Complaint (Dkt. 161), ¶¶ 123-125; Fed. R. Evid. 401. Defendants admit that REDACTED**

19 **B. Dugan**

20 **Dec. ¶ 5; RT 312:14-313:12 (defendants’ response to Request for Admission No. 1).**

21 **Defendants claim that Dr. Ibrahim’s REDACTED “does not interfere with any**
 22 **liberty or property interest” and that Dr. Ibrahim’s “inability to travel to the United States**
 23 **stems from her lack of a visa.” Defs.’ Post-Trial Proposed Findings of Fact and**
 24 **Conclusions of Law, ¶¶ 4, 6. Defendants’ actions regarding Ms. Mustafa Kamal (an**
 25 **American citizen who does not require a visa to travel to the United States) tend to prove**
 26 **that REDACTED serves as an independent basis for infringing upon the right to**
 27 **international travel, separate and apart from the lack of a visa. Fed. R. Evid. 401.**
 28

6. Ms. Mustafa Kamal's assertions regarding her travel difficulties are not relevant to this litigation because the evidence does not involve facts that are of consequence in determining the action, and any probative value is substantially outweighed by the prejudice and confusion on the issues.

Federal Rules of Evidence 401, 403

Response to No. 6: Disagree on the basis that Ms. Mustafa Kamal's travel difficulties are relevant to Dr. Ibrahim's due process claim that placement REDACTED infringes on her fundamental rights, including the right to travel internationally. Second Amended Complaint (Dkt. 161), ¶¶ 123-125; Fed. R. Evid. 401. Defendants admit that REDACTED

REDACTED

Dugan

Dec. ¶ 5; RT 312:14-313:12 (defendants' response to Request for Admission No. 1).

Defendants claim that Dr. Ibrahim's REDACTED "does not interfere with any liberty or property interest" and that Dr. Ibrahim's "inability to travel to the United States stems from her lack of a visa." Defs.' Post-Trial Proposed Findings of Fact and Conclusions of Law, ¶¶ 4, 6. Defendants' actions regarding Ms. Mustafa Kamal (an American citizen who does not require a visa to travel to the United States) tend to prove that REDACTED serves as an independent basis for infringing upon the right to international travel, separate and apart from the lack of a visa. Fed. R. Evid. 401.

Defendants have not shown that the relevance of the information regarding Ms. Mustafa Kamal is outweighed by any risk of unfair prejudice or confusion of the issues. Fed. R. Evid. 403. The fact that individuals with REDACTED

REDACTED can be prevented from traveling is highly relevant and not prejudicial or confusing.

7. Defendants are not responsible for any actions undertaken by Malaysian Airlines.

Proposed Findings of Fact: 11-13; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (noting that a plaintiff lacks standing to challenge the government for actions taken by third parties that the government did not cause); *Allen v. Wright*, 468 U.S. 737, 759-61 (1984) ("The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing")

Response to No. 7: Disagree on the basis that defendants' conduct was the cause of Ms. Mustafa Kamal's inability to fly to the United States. But for defendants' requests, via REDACTED e-mail to Philippine Airlines, Ms. Mustafa Kamal would not have been denied

1 boarding on her flight from Kuala Lumpur to Manila. *See* Mustafa Kamal Dec. ¶¶ 10-19
2 and Ex. C; Dugan Dec. ¶¶ 8-13. “A substantial factor in causing harm is a factor that a
3 reasonable person would consider to have contributed to the harm.” CACI 430; *see also*
4 *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052 (Cal. 1991) (the “substantial factor” test
5 subsumes the “but for” test of causation, that is, “but for” the defendant’s conduct, the
6 plaintiff’s harm would not have occurred). Disagree on the basis that the cases cited by
7 defendants regarding standing are inapposite, given that Dr. Ibrahim does not seek to
8 adjudicate any claims concerning Ms. Mustafa Kamal.

9 DATED: December 20, 2013

McMANIS FAULKNER

10 /s/ Elizabeth Pipkin

11 ELIZABETH PIPKIN

12 Attorneys for Plaintiff,
13 Rahinah Ibrahim
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